Moh Ting King v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPLICATION NO 44–03–95–III
ELIZABETH CHAPMAN JC
19 JUNE 1995

Criminal Procedure *— Bail — Granting of bail — Pending trial — Interference by appellate court — Principles applicable*

The applicant applied for bail pending his trial on a charge of rape under s 376 of the Penal Code (FMS Cap 45). The prosecution objected to bail on the grounds that the offence was non-bailable, the accused was facing another charge of rape under s 376 which was fixed for hearing on 26 June 1995 and further there was a danger that he might intimidate the complainant. The sessions court on 20 May 1995 refused his application and he applied to the High Court.

Held, dismissing the application:

(1) It is well settled that the High Court will not lightly interfere with the lower court's exercise of discretion and where the sessions court judge had refused bail after considering all the circumstances of the case, the High Court will not interfere unless it can be shown that the exercise of the discretion was erroneous.

(2) It was apparent that the refusal to grant bail stemmed from the accused being charged for another offence of rape during his release on bail pending the trial on 26 June 1995. In deciding whether to grant or refuse bail, the court will consider, inter alia, the nature and gravity of the offence charged, the severity and degree of punishment on conviction, the dangers of the offence being repeated, the danger of the witnesses or the prosecution evidence being tampered with, the opportunity of the accused to prepare his defence and his detention period. Bail will not be withheld merely as a punishment and the requirements as to bail are to secure the attendance of an accused person at the trial.

(3) The refusal of the sessions court to grant bail was justifiable in the circumstances. There was a likelihood the accused would intimidate the complainant and that itself was a cogent ground for refusing bail. Furthermore, there was nothing to show that the accused would be hampered in the preparation of his defence whilst under remand and the sessions court judge had fixed the earliest possible date for the trial, ie 26 July 1995, and the period of detention could not therefore be said to be unduly long.

[Bahasa Malaysia summary

Pemohon telah memohon untuk jaminan sementara menunggu perbicaraannya atas tuduhan merogol di bawah s 376 Kanun

Keseksaan (NMB Bab 45). Pihak pendakwa telah membantah terhadap jaminan itu atas alasan bahawa kesalahan itu tak boleh jamin, tertuduh menghadapi satu lagi tuduhan merogol di bawah s 376 yang telah ditetapkan untuk pembicaraan pada 26 Jun 1995 dan seterusnya terdapat bahaya bahawa beliau mungkin mengintimidasi pengadu. Mahkamah sesyen pada 20 Mei 1995 telah menolak permohonan beliau dan beliau telah membuat permohonan ke Mahkamah Tinggi.

Diputuskan, menolak permohonan itu:

(1) Adalah mantap bahawa Mahkamah Tinggi tidak akan bercampur tangan dengan penjalanan budi bicara mahkamah bawahan dengan begitu sahaja dan di mana hakim mahkamah sesyen telah menolak permohonan untuk jaminan selepas mempertimbangkan semua keadaan kes itu, Mahkamah Tinggi tidak akan bercampur tangan kecuali jika ia boleh ditunjukkan bahawa penjalanan budi bicara itu adalah salah.

(2) Adalah jelas bahawa keengganan untuk membenarkan jaminan itu berpunca daripada tertuduh dituduh atas suatu kesalahan merogol yang lain semasa beliau dilepaskan atas jaminan sementara menunggu perbicaraan pada 26 Jun 1995. Apabila membuat keputusan sama ada untuk membenarkan atau menolak jaminan, mahkamah akan mempertimbangkan, antara lain, sifat dan keseriusan kesalahan yang dituduh itu, kekerasan dan darjah hukuman yang dijatuhkan atas sabitan, bahaya bahawa kesalahan itu akan diulangi, bahaya bahawa saksi atau keterangan pihak pendakwa akan diusik atau diubah, peluang tertuduh untuk menyediakan pembelaannya dan tempoh tahannya. Jaminan tidak akan ditolak semata-matanya sebagai suatu hukuman dan keperluan untuk jaminan adalah untuk memastikan kehadiran seseorang tertuduh di perbicaraan.

(3) Keengganan mahkamah sesyen untuk membenarkan jaminan boleh dijustifikasikan di dalam keadaan kes ini. Terdapat kemungkinan bahawa tertuduh akan mengusik pengadu dan itu dengan sendirinya merupakan suatu alasan yang meyakinkan untuk menolak jaminan. Lagipun, tidak terdapat apa-apa untuk menunjukkan bahawa tertuduh akan dihambat dalam penyediaan pembelaannya semasa di bawah tahanan dan mahkamah sesyen telah menetapkan tarikh perbicaraan paling awal yang mungkin, iaitu 26 Julai 1995, dan oleh itu tempoh tahanan tidak boleh dikatakan terlalu lama.]

Notes

For cases on bail, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 542–589.

Case referred to

R v Rose (1891) 67 LJQB 289; 17 Cox 717

Legislation referred to

Penal Code (FMS Cap 45) s 376

John Shek Kwok Bun (*John Shek & Co*) for the applicant.
Ahmad Zubir Jantan (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Elizabeth Chapman JC: This is an application by the applicant to be released on bail pending his trial on a charge of rape under s 376 of the Penal Code (FMS Cap 45). He was first brought before the sessions court on 20 May 1995 on the said charge; he pleaded not guilty and applied to be released on bail. His application was refused, hence this motion before the High Court.

The prosecution objected to bail on the grounds that the offence was non-bailable, the accused was facing another charge of rape under s 376 and the same had been fixed for hearing on 26 June of this year and further there was a danger that he might intimidate the complainant in this case.

It is well settled that the High Court will not lightly interfere with the exercise of discretion vested in the lower court and where the sessions judge refused bail after taking into consideration all the circumstances of the case, the High Court will not interfere with this order unless it can be shown that the exercise of the discretion was erroneous.

From the facts of this case and from a perusal of the record of the court below, it is apparent that the refusal to grant bail in this case stems from the accused being charged for another offence of rape during this release on bail pending the trial on 26 June of this year.

In deciding whether to grant or refuse bail the court will have to take into consideration, amongst other things, the nature and gravity of the offence charged, the severity and degree of punishment which conviction might entail, the dangers of the offence being continued or repeated, the danger of the witnesses being tampered with or that the prosecution evidence might be tampered with, the opportunity of the accused to prepare the defence and the long period of detention of the accused.

It is well settled that bail will not be withheld merely as a punishment and that the requirements as to bail are to secure the attendance of an accused person at the trial — *R v Rose* (1891) 67 LJQB 289; 17 Cox 717, CCA.

In this case, the refusal of the court below to grant bail for the reason given earlier is, in my view, justifiable in the circumstances. The prosecution spoke of the likelihood of the accused intimidating the complainant in this

case and that itself would be a cogent ground for refusing bail. Furthermore, the application for bail is not supported by any affidavit by the accused and the submission put forward on behalf of the accused by learned counsel is that the sessions judge had not exercised her discretion correctly. I do not find this to be the case nor do I find that the exercise of the discretion was not done judicially. There is also nothing to show that the accused would be hampered in the preparation of his defence whilst under remand. Indeed, I do not find any exceptional and special grounds that would justify the granting of bail here. It is also noted that the sessions judge had fixed the earliest possible date for the trial, ie on 26 July 1995; the period of detention cannot therefore be said to be unduly long.

For the reasons given above, I hold that the lower court had not erred in the exercise of its discretion; the application is accordingly dismissed.

Application dismissed.

Reported by Anne Khoo